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 6 Inc. and USF&G, Defendants

7
 8 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ALASKA AT ANCHORAGE

9
 10 UNITED STATES OF AMERICA for the use of)
 NORTH STAR TERMINAL & STEVEDORE)
 COMPANY, d/b/a NORTHERN STEVEDORING)
 & HANDLING, and NORTH STAR TERMINAL &)
 STEVEDORING COMPANY, d/b/a Northern)
 Stevedoring & Handling, on its own behalf,)
 Plaintiff,)
 and)
 11
 12 UNITED STATE OF AMERICA for the use of)
 SHORESIDE PETROLEUM INC., d/b/a Marathon)
 Fuel Service, and SHORESIDE PETROLEUM)
 INC., d/b/a Marathon Fuel Service, on its own)
 behalf,)
 Intervening Plaintiffs,)
 and)
 METCO, INC.,)
 Intervening Plaintiff,)
 vs.)
 NUGGET CONSTRUCTION INC.; SPENCER)
 ROCK PRODUCTS INC.; UNITED STATES)
 FIDELITY AND GUARANTY COMPANY; and)
 ROBERT A. LAPORE,)
 Defendants.)
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No. 3:98-cv-00009-TMB

NUGGET'S MOTION IN
LIMINE RESPECTING
CLAIMS BY AND/OR
SETTLEMENT WITH SECOND
TIER VENDORS

1
2 I. INTRODUCTION
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4 Nugget Construction Company ("Nugget") moves the court for an order *in limine*
5 excluding at trial all statements, argument, testimony, documentary or other evidence
6 pertaining to claims asserted by, or settlement reached with, second-tier project vendors
7 other than North Star against Nugget and its surety.
8

9 II. BACKGROUND
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11 This litigation arises from a construction project in Homer, Alaska for which
12 Nugget was the general contractor. North Star Terminal and Stevedoring Company
13 ("North Star") was a vendor of Nugget's rock supplier, Spencer Rock Products, Inc.
14 ("Spencer"). At this time, North Star is the only second-tier vendor remaining with
15 claims against Nugget, the other second-tier vendors, Shoreside Petroleum, Inc.
16 ("Shoreside") and Metco, Inc. ("Metco") having settled their claims against Nugget and
17 its surety.¹ Prior to those settlements North Star listed employees of Shoreside, Metco
18 and Chugach Rock Products as potential witnesses, presumably to adduce testimony
19 from them concerning their work for Spencer and their respective efforts to obtain
20 payment from Nugget and/or Spencer for amounts Spencer owed them. For the
21 reasons set forth below, such testimony should be barred from trial, as should any other
22 evidence or commentary about those claims and/or their resolution.
23

24 III. ARGUMENT
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A. The Evidence Lacks Relevance

Only relevant evidence is admissible. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the

¹ Metco has recently been paid in full pursuant to the terms of its settlement agreement. Metco's counsel has been out of state, so the stipulation for dismissal will be filed upon his return.

1 determination of the action more probable or less probable than it would be without the
 2 evidence." Fed. R. Evid. 401.

3 Although in many cases courts have held, either expressly or impliedly, that
 4 evidence of other claims brought against a litigant arising out of the same, or related,
 5 transactions or occurrences is relevant (though not necessarily admissible), see
 6 *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1364-65 (10th Cir. 1987), the
 7 relevance of such evidence is not to be taken for granted simply because it relates to
 8 claims against the same litigant arising out of the same or a closely related set of
 9 circumstances. The evidence must be "persuasive or indicative that a fact in
 10 controversy did or did not exist because the conclusion in question may be logically
 11 inferred from that evidence." *United States v. Allison*, 474 F.2d 286 (5th Cir. 1973).
 12 For example, in *Manko v. United States*, Not Reported in F. Supp., 1998 WL 391129
 13 (S.D.N.Y. 1998), the court held that evidence of a criminal defendant's civil settlement
 14 with the I.R.S. was not relevant to, or probative of, the defendant's guilt or innocence in
 15 the criminal trial arising from the same transactions. Similarly, in *Koch v. Koch
 16 Industries, Inc.*, 2 F. Supp. 2d 1385, 1393 (D. Kan. 1998), the court held that there was
 17 "minimal relevance" in the details of a litigant's failure to comply with the terms of the
 18 settlement of claims closely related to those before the court, and sustained the motion
 19 in limine to exclude this evidence.

20 Evidence of the claims that were brought by Shoreside and Metco and
 21 threatened by Chugach Rock Products have no relevance to North Star's claims against
 22 Nugget. The factual determinations critical to North Star's claims and Nugget's
 23 defenses to those claims are focused on the dealings between and among Nugget,
 24 Spencer and North Star. The facts and circumstances underlying other entities' claims
 25 do nothing to prove or disprove the existence of any fact determinative of North Star's

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1 claims and/or Nugget's defenses to North Star's claims. Consequently, such evidence
 2 lacks relevance and is inadmissible pursuant to Fed. R. Evid. 401, 402.

3 **B. The Evidence Is Unfairly Prejudicial**

4 Even if such evidence were marginally relevant, the court should still exclude it
 5 due to its prejudicial effect. Relevant evidence "may be excluded if its probative value is
 6 substantially outweighed by the danger of unfair prejudice, confusion of the issues, or
 7 misleading the jury, or by considerations of undue delay, waste of time, or needless
 8 presentation of cumulative evidence." Fed. R. Evid. 403.

9 Federal courts have excluded evidence of other controversies in which a party
 10 was involved due to the danger of unfair prejudice. For example, in a products liability
 11 action against an herbicide manufacturer, the court excluded evidence of previous
 12 lawsuits and complaints brought against the manufacturer, finding that such evidence
 13 had "faint probative value" and a "high potential for unfair prejudice." *Yellow Bayou*
 14 *Plantation, Inc. v. Shell Chemical, Inc.*, 491 F.2d 1239 (5th Cir. 1974). Similarly, the
 15 introduction of evidence of other second tier vendors' claims against Nugget, and
 16 particularly Nugget's decision to settle those claims before trial, would be unfairly
 17 prejudicial to Nugget's defense against North Star's claims and should be excluded
 18 pursuant to the court's discretion under Fed. R. Evid. 403.

19 **C. Evidence of Settled Claims Is Inadmissible Pursuant to Fed. R. Evid. 408(a)(1)**

20 Federal Rule of Evidence 408(a)(1) provides another basis for excluding
 21 evidence of Shoreside's and Metco's settled claims. Pursuant to this rule, evidence of
 22 "furnishing or offering or promising to furnish--or accepting or offering or promising to
 23 accept--a valuable consideration in compromising or attempting to compromise the
 24 claim" is not admissible. Fed. R. Evid. 408(a)(1).

1 Evidence of completed compromises is also not admissible against the
 2 compromising party. *Playboy Enterprises, Inc. v. Chuckleberry Pub.*, 486 F. Supp. 414
 3 (S.D.N.Y. 1980). Evidence of settlement negotiations between a party to litigation and a
 4 third party are similarly inadmissible. *United States v. Contra Costa County Water Dist.*,
 5 678 F.2d 90 (9th Cir. 1982). An important reason for this rule is the fact that while
 6 evidence of prior settlements with other parties may be relevant, its relevance is
 7 substantially outweighed by the danger that the party against whom the evidence of
 8 settlement is offered will be unfairly prejudiced, in that the judge or jury may use that
 9 evidence to evaluate the claim before the court. *Alpex Computer Corp. v. Nintendo Co.,*
 10 *Ltd.*, 770 F. Supp 161 (S.D.N.Y. 1991).

11 The use of such evidence to evaluate North Star's claims against Nugget
 12 becomes even more prejudicial when one considers, as the Alaska Supreme Court
 13 commented in a recent case, that "in practice settlement amounts reflect complicated
 14 and opaque considerations, such as settling parties' respective risk propensities, the
 15 value of peace from further litigation, and a settling party's immediate financial situation.
 16 The value of settlement is not perfectly related to a plaintiff's actual damages--indeed,
 17 the relationship may be only a rough approximation." *Petrolane, Inc. d/b/a Petrolane*
 18 *Gas v. Robles*, 154 P.3d 1014, 1021-22 (Alaska 2007).

19 In light of the strong public policy encouraging settlement of lawsuits that would
 20 be frustrated if litigants were not assured that their settlements of claims would later be
 21 used against them, and in light of the authorities cited above, the court should exclude
 22 any evidence of project claims against Nugget and its surety other than the North Star
 23 claim, and the settlements with Shoreside and Metco.

1 Dated: June 14, 2007

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CERTIFICATE OF SERVICE

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I hereby certify that on this 14th day of
June, 2007, a true and correct copy of
the foregoing was served electronically
on:

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